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Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1998

CASSIS MANAGEMENT CORPORATION,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR WRIT OF CERTIORARI

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84 pp

## QUESTIONS PRESENTED

1. Did the National Labor Relations Board (herein the "NLRB") err when it found Donald Hoy to be an employee rather than a supervisor and failed to interpret and apply Section 2(11) of the National Labor Relations Act in the disjunctive?

2. Did the United States Court of Appeals for the Second Circuit err in failing to overturn the decision of the NLRB when it found the issue of Hoy's supervisory status "presented a close question" and further found that 'some factors' militated in favor of finding him a supervisor . . ." and still further found "there was evidence to support an inference in either direction"?

## PARTIES TO THE PROCEEDING

The parties to the proceeding are the Petitioner Cassis Management Corp. and the Respondent NLRB. Local 32E, Service Employees International Union AFL-CIO (herein "Local 32E") did not intervene in the proceedings before the United States Court of Appeals for the Second Circuit (herein the "Court of Appeals").

The Petitioner is wholly owned by the Cassis Family Limited Partnership, a New York limited partnership made up of only members of the Cassis family. The petitioner has no nonwholly owned subsidiaries.

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Petitioner Cassis Management Corp. (herein "Cassis"), respectfully requests that a writ of certiorari be issued to review the decision of the National Labor Relations Board and the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The decisions of the National Labor Relations Board appear in Appendices B, C and D. The Summary Order of the United States Court of Appeals for the Second Circuit is not published, but can be found at 1998 WL 386197 (App. A).

## STATEMENT OF JURISDICTION

The Summary Order of the United States Court of Appeals for the Second Circuit was entered on April 22, 1998. The Court of Appeals denied a timely petition for rehearing on July 21, 1998. (App. E.) The jurisdiction of this court is involved pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. § 153(11) defines a "supervisor" as:

> Any individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or reasonably to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

## STATEMENT OF THE CASE

The fundamental questions in this case are whether Donald Hoy is a supervisor or an employee within the meaning of the Act and more specifically, whether the NLRB correctly interpreted and applied Section 2(11) of the Act. Additionally, a question exists as to whether the Second Circuit correctly concluded there was substantial evidence to support the finding Hoy was an employee rather than a statutory supervisor notwithstanding the court's finding of "factors militating in favor of finding him to be a supervisor. . . ."

## FACTS CONCERNING DONALD HOY'S EMPLOYMENT STATUS

Cassis owns and manages the Mountainview Apartments located in Dobbs Ferry, New York. The Mountainview Apartments are situated on 15 acres of land and compromise fourteen buildings of which there are a total of 262 apartments.

Commencing in or about 1993 and continuing forward, Donald Hoy began serving the complex as a superintendent.

From in or about 1993, in his capacity as superintendent, Hoy, who was provided with an on-premises apartment, was not required to pay any rent, although the value of such apartment was approximately $750 a month. No other employee received such a benefit. In addition to being provided with a rent-free apartment and a Jeep, Hoy received a gross weekly salary of $100 and an additional weekly cash sum of $350. In contrast, maintenance men and porters received pay rates of $8.00 per hour.

In his capacity as superintendent, Hoy would meet each morning at 8:00 a.m. with the complex's maintenance men and

porters and issue their work assignments for the day. Hoy, would, on a daily basis, check upon the work of the maintenance men and porters, resolve problems concerning job duties and, when necessary, assign employees to assist their co-employees in the performance of their duties. Hoy worked from 8:00 a.m. to 5:00 p.m., Monday through Friday and was on call 24 hours a day.

As part of his duties as superintendent, Hoy regularly exercised independent discretion by interviewing prospective candidates for employment for the positions of maintenance men and porter, reviewing their employment applications with respect to work history and prior experience and weeding out those candidates who he concluded were not suitable for the job.

Having weeded out undesirable candidates, Hoy would recommend to Complex General Manager George Cassis the candidate to be selected to the position. In addition, Hoy would verify the employment references provided by the prospective candidates.

Hoy acknowledged that as superintendent he conducted employment interviews with no less than five job candidates. He specifically admitted on direct examination that he was ". . . the supervisor of the property."

Hoy acknowledged that he not only interviewed employee Bunch, but hired him, reviewed the duties to be performed and negotiated Bunch's starting salary. In this connection, Hoy as superintendent recommended wage increases to be paid to maintenance men and porters.

Employees Louis Cioffi, Charles Allien and Dean Cassametis testified that they took daily instructions from Hoy

as to the work to be performed and that Hoy would give them specific tasks to perform in addition to their routine duties.

In connection with Hoy's supervisory duties, maintenance men and porters would directly notify him when they intended to be absent due to illness or for other reasons. When Hoy went on vacation on or about March 29, 1996, he left a detailed schedule of jobs to be performed by the maintenance men and porters and left same with the complex office manager Kathy Shea.

## REASONS FOR GRANTING THE WRIT

### I.

### THE PETITION SHOULD BE GRANTED BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO FIND HOY WAS A STATUTORY SUPERVISOR.

In its Summary Order (App. A at 3a) the Second Circuit held that the

> matter of whether Hoy was a supervisor within the meaning of Section 29 U.S.C. § 152(11) presented a close question. Some factors militated in favor of finding him a supervisor, and some militated against such a finding.

The court then proceeded to conclude that "there was evidence to support an inference in either direction" as to whether Hoy was or was not a supervisor. (App. A at 4a).

Given the Second Circuit's finding that there was evidence to support an inference in either direction as to Hoy's supervisory status, it is urged that the court was incorrect in

finding that there was substantial evidence to support the NLRB's decision.

The United States Supreme Court in *Universal Camera Corp.*, 340 U.S. 464, 715 S. Ct. 456 (1951) held:

> Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

Significantly, evidence which is found to support an inference "in either direction" would not appear to satisfy the definition of "substantial evidence." Likewise, evidence which is found to support an inference in either direction and which includes some factors that militate in favor of finding an individual to be a supervisor and some evidence militating against such a finding does not satisfy the *Universal Camera, supra*, test of finding

> that the evidence supporting the NLRB's decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

In *Schnuck Markets, Inc. v. N.L.R.B.*, 961 F.2d 700 (8th Cir. 1992), the Eighth Circuit observed as follows:

> Meeting the substantial evidence standard . . . requires more than a parsing of the record for evidence supporting the Board's decision. We also must consider evidence in the record that fairly detracts from the weight of the decision.

Significantly, the Second Circuit failed to take into account the evidence which detracted from the NLRB's decision to the effect that Hoy was an employee rather than a supervisor.

Given the Second Circuit's conclusion that there was evidence which supported an inference in either direction as to Hoy's supervisory status and given the proposition that Section 2(11) should be read in the disjunctive, the Second Circuit should have reached its own conclusions as to whether Hoy was a supervisor and reversed the NLRB's decision.

## II.

## THE PETITION SHOULD BE GRANTED BECAUSE THE NLRB HAS MANIPULATED AND FAILED TO CONSISTENTLY INTERPRET SECTION 2(11) IN THE DISJUNCTIVE.

In 1994 the United States Court of Appeals for the Second Circuit in *N.L.R.B. v. Baby Watson Cheesecake, Inc.*, Lexis 3027, 1992 WL58825, 148 LLRM 2898, 2903 (2nd Cir. 1994) held that in a assessing an "individual's status, one must look to his actual job duties and not simply to his job title or classification."

In considering issues concerning supervisory status, the Second Circuit in *N.L.R.B. v. Baby Watson Cheesecake, Inc., supra,* specifically concluded that the definition of a supervisor is "intended to be read in the disjunctive so that, an employee who meets any of the criteria set forth in this section is deemed to be a supervisor within the meaning of the Act." (*See in accord N.L.R.B. v. Monroe Tube Co.*, 545 F.2d 1320, 1324 (2nd Cir. 1976); *Amalgamated Local Union 355 v. NLRB*, 482 F.2d 996, 999 (2nd Cir. 1973); *NLRB v. Metropolitan Life Insurance*, 405 F. 2d 1169, 1173 (2nd Cir. 1968); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 360 (1st Cir. 1980).

The Second Circuit in *Spentonbush/Redstar Company v. NLRB*, 106 F. 3d 484 (2nd Cir. 1997) observed that the NLRB all too often rejects evidence which does not support its preferred result and went on to point out that the NLRB's "manipulation" of the definition of supervisor had reduced the deference that would otherwise be accorded to its holdings.

In *Spentonbush/Redstar, supra,* Circuit Judge Van Graafeiland observed as follows:

> The deference owed by the judiciary to the decisions of the Board has been stated on numerous occasions and need not now be reiterated here. However, the Board's biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board's decisions in this area.

In March of 1998, the Second Circuit again had occasion in *NLRB v. Meenan Oil Co.*, 139 F. 3d 311 to review the NLRB's application of Section 2(11) of the Act. In this decision, the Second Circuit concluded that it was appropriate to apply a "more probing" standard of review. Specifically, the Second Circuit held as follows:

> If (1) an employee possesses at least one of the listed kinds of authority and (2) the exercise of that power involves the use of independent judgment which goes beyond the routine and clerical, the employee qualifies as a supervisor.

Given the fact that the Second Circuit concluded that there were factors which militated in favor of finding Hoy to be a supervisor and based upon the legal proposition that Section 2(11) of the Act is to be read in the disjunctive, the Second

Circuit in accord with the decision in *Universal Camera Corp. v. NLRB, supra,* should have found that Hoy was a supervisor and reversed the decision of the NLRB.

In the case before this court, there is no substantial evidence to support the NLRB's determination that Donald Hoy was an employee rather than a supervisor. To the contrary, there is substantial evidence in the record to establish as concluded by both Administrative Law Judge Green (App. D at 48a-51a) and by dissenting NLRB member Higgins that Hoy was a supervisor within the meaning of the Act. (App. C at 39a).

Upon a review of the record, it is respectfully urged that NLRB Chairman Gould and member Fox chose to disregard the findings and conclusions of Administrative Law Judge Green as to Hoy's supervisor status and in fact mischaracterized and misstated the record in order to reach the conclusion that Hoy was not a supervisor. (App. C at 23a).

In view of the fact that Section 2(11) of the Act is intended to be read in the disjunctive and upon reviewing Hoy's various duties, it is clear that Hoy had authority to hire and/or effectively recommend hiring, to transfer employees, to assign employees and to responsibly direct employees in the course of their duties. In addition, the record indicates that Hoy had authority to adjust grievances and/or to effectively recommend action to be taken with respect to such grievances.

Significantly, the record clearly established that Hoy was given independent authority to interview candidates for employment and to weed out those candidates whom he concluded did not have the qualifications or other attributes to successfully fill the positions involved. (App. D at 50a and App. C at 39a).

Clearly, when one considers Hoy's duties and responsibilities, one can only conclude, as did the Administrative Law Judge and dissenting NLRB member Higgins, that Hoy was a "supervisor" and exercised his authority not merely in a routine or clerical nature but by means of the use of independent judgment.

## CONCLUSION

This case presents questions of exceptional and ongoing importance. Specifically, this case presents the question of whether the NLRB is obligated to consider and apply Section 2(11) of the Act in the disjunctive when determining the supervisory status of an individual. Additionally, by granting this petition for certiorari, this court will have the opportunity of reiterating and amplifying upon the role of Courts of Appeal in determining whether substantial evidence exists to support NLRB factual findings and conclusions of law.

Accordingly, Petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 22, 1998

### UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### SUMMARY ORDER

**THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the **Twenty-Second** day of **April,** one thousand nine hundred and ninety-eight.

Present: HONORABLE AMALYA L. KEARSE,
HONORABLE ROGER J. MINER,
Circuit Judges,

HONORABLE CAROL BAGLEY AMON,
District Judge*.

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* Honorable Carol Bagley Amon, of the United States District court for the Eastern District of New York sitting by designation.

*Appendix A*

No. 97-4125
-4355

CASSIS MANAGEMENT CORPORATION,

*Petitioner-Cross-Respondent,*

- v. -

NATIONAL LABOR RELATIONS BOARD,

*Respondent-Cross-Petitioner.*

Appearing for Petitioner —
Cross-Respondent: Robert M. Ziskin, Commack, N.Y.

Appearing for Respondent —
Cross-Petitioner: Ana L. Avendaño, NLRB,
Washington, D.C.

Petition for review of orders of the National Labor Relations Board; cross-petition by National Labor Relations Board for enforcement of its orders.

This cause came on to be heard on the transcript of record from the National Labor Relations Board and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of the National Labor Relations Board be, and they hereby are enforced, and that the petition for review be and hereby is denied.

*Appendix A*

Petitioner-Cross-Respondent Cassis Management Corporation ("Cassis") petitions for review of two orders of the National Labor Relations Board (the "Board"), 323 NLRB No. 68 dated April 14, 1997, 324 NLRB No. 55 dated August 29, 1997, requiring it to, *inter alia*, recognize and bargain with a union and reinstate several terminated employees. The Board cross-petitions for enforcement of its orders. Cassis's principal contention is that the Board erred in finding that its employee Donald Hoy was not a supervisor within the meaning of 29 U.S.C. § 152(11). It also contends that the Board erred in determining that another employee was an employee rather than an independent contractor and that certain other terminated employees should be reinstated. We reject all of Cassis's contentions.

The Board's findings of fact are "conclusive" on appeal, so long as they are supported by substantial evidence on the basis of the record considered as a whole. *See* 29 U.S.C. § 160(f) (1994); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). Substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see, e.g., Holo-Krome Co. v. NLRB*, 947 F.2d 588, 592 (2d Cir. 1991) Although we consider both the evidence that supports the Board's decision and the evidence that suggests a contrary result, *see, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. at 487-88, this Court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*," *id.* at 488.

In the present case, the matter of whether Hoy was a supervisor within the meaning of 29 U.S.C. § 152 (11) presented

a close question. Some factors militated in favor of finding him a supervisor, and some militated against such a finding. Given that there was evidence to support an inference in either direction, we conclude that the Board's finding that Hoy was not a supervisor was supported by substantial evidence and may not be overturned.

We reject Cassis's other contentions substantially for the reasons stated in the Board's Decision and Order dated April 14, 1997.

We have considered all of Cassis's contentions in support of its petition for review and have found in them no basis for overturning the orders of the Board. The petition for review is denied; the petition for enforcement is granted.

FOR THE COURT:
GEORGE LANGE III, Clerk
by: s/ Lucille Carr

## APPENDIX B — SUPPLEMENTAL DECISION AND ORDER DATE MAY 7, 1997

**Cassis Management Corporation *and* Service Employees International Union, Local 32E, AFL-CIO, Case 2-CA-29311**

August 29, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 30, 1996, Administrative Law Judge Raymond P. Green issued a decision in this case finding that the Respondent discharged the entire bargaining unit, including Charles W. Morrow, in violation of Section 8(a)(3) and (1) of the Act, that Donald Hoy was a supervisor within the meaning of Section 2(11) of the Act, that the authorization cards Hoy solicited were invalid, and that there was no basis for a bargaining order under the principles enunciated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). On April 14, 1997, The National Labor Relations Board issued a decision adopting the judge's findings concerning the unlawful discharge of the bargaining unit employees, but the Board reversed the judge's findings concerning Hoy's supervisory status, the validity of the authorization cards, and the appropriateness of a bargaining order.[1] Thus, the Board found that Hoy was not a statutory supervisor, that he should be offered reinstatement and backpay along with the rest of the bargaining unit, that the authorization

1. 323 NLRB No. 68 (Chairman Gould and Member Fox; Member Higgins dissenting).

cards he solicited were valid, and that the cards demonstrated that a majority of the employees in the unit wished to be represented by the Union. The Board further found that, because of the Respondent's egregious unfair labor practices, a bargaining order was presumptively appropriate.

The National Labor Relations Board, however, did not order the Respondent to bargain with the Union because of the need to resolve a conflict in the hearing testimony as to facts concerning the Respondent's allegation that union officials had engaged in picket line misconduct. The Respondent claims that the alleged misconduct precludes the issuance of a bargaining order under the doctrine set forth by the Board in *Laura Modes Co.*, 144 NLRB 1592 (1963). The board remanded the matter to the judge for the purpose of making credibility resolutions concerning the conflicting testimony, and findings of fact and conclusions of law concerning the Respondent's defense based on *Laura Modes Co.*

On May 7, 1997, the judge issued his supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed and answering brief.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions set forth in the supplemental decision, and to issue the Order set

2. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

forth below,[3] which supersedes the order previously entered in this proceeding.[4]

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3. On May 12, 1997, the Respondent filed a motion for reconsideration and to reopen the record, and the General Counsel subsequently filed a reply. In its motion for reconsideration, the Respondent contends, among other things, that in reaching its conclusion that Hoy was not a statutory supervisor, the Board erroneously found on p. 2 of its decision that "Hoy and the other unit employees met with [Property Manager] Shea daily in the office at 8 a.m. and discussed the work that needed to be done." The Respondent asserts that the Board's finding is inconsistent with Shea's testimony that she did not report to work until 9 a.m.

Even assuming arguendo that Shea was not present for the 8 a.m. meetings, the Board would still reach the same result. The question whether Shea was present at the morning meetings is immaterial because the Board found that Hoy's role at those meetings was not indicative of supervisory status. Thus, the Board found that at the daily meetings Hoy merely informed "his coworkers if something had occurred during the night that they were required to deal with before they returned to their normal routine," that "no independent judgment was required to determine what problems constituted emergencies," and that "Hoy's announcements of emergency repairs cannot be considered evidence of supervisory authority." *Cassis*, supra, slip. op. 3.

In all other respects, the Respondents's motion for reconsideration is denied as raising nothing not previously considered and as lacking in merit.

In its motion to reopen the record, the Respondent asserts that Donald Hoy is deceased, and therefore a reinstatement order as to Hoy is not appropriate. The General Counsel acknowledges that Hoy is deceased, and therefore submits that there is no need to reopen the record on this matter. Accordingly, we shall modify the Order by deleting Hoy's name from the list of employees to be reinstated and by providing that his estate shall be made whole.

(Cont'd)

*Appendix B*

(Cont'd)

The Respondent also asserts that the record must be reopened to demonstrate changed circumstances affecting the reinstatement of the discriminatees. First, the Respondent contends that it should be permitted to offer evidence that certain of the discriminatees are not entitled to reinstatement, because they were unable to perform their work in a satisfactory manner. We find that this issue either was, or should have been, litigated by the Respondent during the underlying unfair labor practice hearing. In addition, we find that the Respondent has failed to demonstrate that the evidence it seeks to adduce on this matter is either newly discovered since the close of the hearing or was previously unavailable. See sec. 102.48(a)(1) of the Board's Rules. Second, the Respondent submits that it should be given the opportunity to introduce evidence that since the April 1996 discharges of the discriminatees, it changed the nature of its business operation by contracting out to another company the maintenance work that the discriminatees performed. The mere fact that the Respondent may have subcontracted out his work does not relive the Respondent of its obligation to reinstate unlawfully discharged employees. See *Stalwart Assn.*, 310 NLRB 1046, 1055 (1993); *Central Air Corp.*, 216 NLRB 204, 214 (1975). Rather, the Respondent must prove that it would have subcontracted the work in question even if the discriminatees had not been terminated, and during the compliance stage of this proceeding the Respondent will have an opportunity to present evidence bearing on that issue. See *Ellis & Watts Products*, 143 NLRB 1269, 1271 (1963), enfd. 344 F.2d 67 (6th Cir. 1965). Accordingly, we deny the Respondent's motion to reopen the record.

4. Member Higgins joins the majority in affirming the judge's finding that there is not credible evidence of any picket line misconduct, and in denying the Respondent's motion for reconsideration and to reopen the record. However, he continues to adhere to his earlier dissenting view of this case. Thus Member Higgins finds that Donald Hoy was a supervisor and that union authorization cards cannot be used to support a bargaining order. See *Cassis Management Corp.*, 323 NLRB No. 68 (April 14, 1997), Member Higgins dissenting.

*Appendix B*

In *Laura Modes*, the Board held that where a union evidences total disinterest in enforcing its rights through the peaceful legal process provided by the Act and instead resorts to violence, the Board will refuse to issue a bargaining order, even though the employer has violated the Act. Here, the judge found, based on his credibility findings, that no agent of the Union or prounion employee engaged in any picket line misconduct, Specifically, the judge discredited the testimony of the Respondent's witnesses and found that no threats were made by union officials or agents to kill or physically harm employees Reyes and Jusino, who had crossed the Union's picket line in order to perform work for the Respondent. As stated in footnote 2, supra, there is no basis for reversing the judge's credibility resolutions. Therefore, we find that there is nothing to preclude a bargaining order under the doctrine set forth in *Laura Modes*, supra.[5]

Accordingly, based on the judge's credibility findings in his supplemental decision and our own findings in our prior decision summarized above, we conclude that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union on April 4, 1996, and we shall order the Respondent to bargain with the Union as the exclusive representative of the employees in the bargaining unit.

---

5. The Respondent excepts to the judge's failure to find that Union Official Formisano threatened to suspend employee Reyes' pension checks and that thereafter Reyes' pension payments were, in fact, suspended. We find not merit in this exception. Any such alleged threats are beyond the scope of the Board's remand, which was for the express purpose of consideration of alleged death threats directed at Reyes or other employees. In any event the record indicates that any cessation of Reyes' pension payments that may have occurred were in accord with the terms of the Union's pension plan.

*Appendix B*

ORDER

The National Labor Relations Board orders that the Respondent, Cassis Management Corporation, Dobbs Ferry, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Service Employees International Union, Local 32E, AFL-CIO or any other union.

(b) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time and regular part-time cleaning, painting, and maintenance workers employed by the Employer at its facility located at 200 Beacon Hill Road, Dobbs Ferry, New York, excluding all managers and supervisors as defined in the Act.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody

Jr., and Charles W. Morrow, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody, Jr., Charles W. Morrow, and the estate of Donald Hoy, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) On request, recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Dobbs Ferry, New York facility copies of the attached notice

marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. August 29, 1997

| | |
|---|---|
| William B. Gould IV, | Chairman |
| Sarah M. Fox, | Member |
| John E. Higgins, Jr., | Member |

(SEAL) NATIONAL LABOR RELATIONS BOARD

6. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

*Appendix B*

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting Service Employees International Union, Local 32E, AFL-CIO or any other union.

WE WILL NOT refuse to recognize and bargain with Service Employmees International Union, Local 32E, AFL-CIO as the exclusive collective-bargaining representative of employees in the following appropriate unit:

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All full-time and regular part-time cleaning painting, and maintenance workers employed at our facility at 200 Beacon Hill Road, Dobbs Ferry, New York, excluding all managers and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Charles Allien, Louis Cioffi, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, and the estate of Donald Hoy, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, on request, recognize and bargain with Service Employees International Union, Local 32E, AFL-CIO as the exclusive collective-bargaining representative of our employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, WE WILL embody the understanding in a signed agreement.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Charles Allien, Louis Cioffi, Donald Hoy,

Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

CASSIS MANAGEMENT CORPORATION

*Ian Penny Esq.* and *Lauri Kaplan Esq.*, for the General Counsel.

*Robert Ziskin, Esq.* and *Stacey Ziskin, Esq.*, for the Respondent.

*Mathew N. Persanis, Esq.*, for the Charging Party.

SUPPLEMENTAL DECISION

RAYMOND P. GREEN, Administrative Law Judge. On April 14, 1997, the board issued its decision in this case wherein it found that the employer had violated the Act in certain respects. As part of that decision, the Board remanded a portion of the case to me for further determination. In this regard, the Board noted that two employees, Carlos Reyes and Israel Jusino, were told by a union official at the picket line that he wanted to kill them. This was denied by the Union's witnesses and the Board remanded this question for a credibility finding.

I have reviewed again the relevant portions of the transcript and have considered the briefs previously filed by the parties. I have also considered the demeanor of the witnesses in making the following conclusions. (In conjunction with the transcript and my own notes taken at the hearing, I recall these witnesses, notwithstanding that their testimony was taken on July 31 and August 1, 1996.) As the previously filed briefs dealt with this contention, there is no need for further briefing on this issue.

*Appendix B*

Therefore, based on the record as a whole, the briefs filed by the parties and my observation of the demeanor of the witnesses, I make the following findings.

Both of the witnesses presented by the Respondent were hired as replacements for the illegally discharged employees. One of them, Carlos Reyes, had previously worked for the employer and indicated that he had received lots of favors from George Cassis in the past. The testimony of George Cassis also indicated that there was some animosity between Hoy and Reyes.

Reyes testified that he was threatened every day with statements by the pickets and by union officials to the effect that they wanted to kill him. He pointed specifically to Anthony Formisano, a business representative, as being one of the people who made this threat. Reyes also testified that Formisano made a threat to kill him, when handing him a piece of paper which was a charge by the Union. (R. Exh. 13.) In the latter regard, Reyes testified that a policeman was present when he got this paper.

Jusino testified that that one or more of the people on the picket line said, "he was going to kill one of — he want to poke us." He went on to testify that the pickets called Reyes and old man and said that the was going to lose his check. According to Jusino, statements were made to himself and Reyes almost every day for about 2 weeks after the picketing started. When asked if he recognized Formisano in the courtroom, Jusino said that he did. However, when asked if Mr. Formisano made the threats, Jusino said that he did not. When asked who made the threats to kill or comment about poking, Jusino said that it "was a colored guy who was saying

every day that he wanted to kill one of you. He wanted to poke us."

Formisano and Union Business Agent Angel Figueroa testified that they supervised the picketing and were there almost every day. Both credibly denied making any threats to kill either Reyes or Jusino. Both credibly testified that no such threats were made in their presence by any of the other people on the picket line. With respect to the charge noted above, Formisano testified that when he tried to hand it to Reyes, the latter became very agitated and a policeman came over to explain to Reyes that all he (Formisano) wanted was to hand him the piece of paper.

The General Counsel called police officers Curt Giacobbe and Gregory Vince to testify in this matter. Both testified that as far as they observed, the picketing was peaceful and without any incidents of threats or violence.

Officer Giacobbe testified to the incident when Formisano gave the paper to Reyes and his testimony was that Formisano made no threats during that incident.

Officer Vince testified that he was dispatched to the picket line on three occasions, once when it was reported that the pickets were on the property and the other two times when it was reported that there was some blockage of entrances. In describing what he saw when he arrived, Officer Vice testified that he saw "a peaceful demonstration of numerous picketers standing on the street area." There was no indication in his testimony, or in any other testimony, that Reyes and Jusino had ever complained to the police about alleged threats of physical harm or alleged threats to kill them.

In conclusion, I do not credit the testimony of Reyes and Jusino about the alleged threats.

Dated Washington, D.C. May 7, 1997

## APPENDIX C — DECISION AND ORDER DATED APRIL 14, 1997

**Cassis Management Corporation** *and* **Service Employees International Union, Local 32E, AFL-CIO.** Case 2-CA-29311

April 14, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 30, 1996, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Respondent filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has considered the decision* and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this decision.

We agree with the judge's findings that the Respondent discharged the entire bargaining unit, including employee Charles W. Morrow, in violation of Section 8(a)(3) and (1) of

* We correct the following inadvertent error in sec. II, A, par. 11, of the judge's decision "Branch" should read "Bunch."

1. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

the Act, and that the unit employees named in the recommended Order should be offered reinstatement and be made whole for their losses. We do not agree, however, with the judge's findings that Donald Hoy is a supervisor within the meaning of Section 2(11) of the Act. Accordingly, we reverse the judge and find that Hoy was unlawfully discharged, that the union authorization cards solicited by Hoy were valid, that the Union demonstrated that a majority of the employees in the bargaining unit wished to be represented by the Union, and therefore, that there is a basis for a bargaining order under the principles enunciated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

The Facts

The Respondent is owned and operated by the Cassis family. The Respondent owns and manages the 262 unit Mountainview Apartments. As of April 4, 1996,[2] the following individuals were employed at Mountainview: General Manager George Cassis; Property Manager Kathleen Shea (a stipulated supervisor); office clerical Carol McNiff; Superintendent Donald Hoy; handymen Joe Moody, Charles Morrow, and Dean Cassimitis (a family member and not part of the unit); and porters Charles Allien, Louis Cioffi, and Nicholas Michel.

In the second or third week of March, Hoy met with officials of the Union, obtained authorization cards, signed a card himself, and solicited the other employees to sign cards. Union Attorney Matthew Parsanis, by a letter dated March 26, requested recognition based on cards signed by a majority of the Respondent's six employees, namely, Hoy and employees Cioffi, Moody, and Morrow. The Union received no reply to its letter, and the Union filed a petition for a representation election on April 3.

2. All dates are in 1996 unless otherwise indicated.

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The judge found that George Cassis received the Union's letter on or before April 4. On the afternoon of April 4, Kathleen Shea informed all the employees that they were discharged. Immediately thereafter, Charles Morrow telephoned George Cassis, who said that he had gotten a letter from the Union, that he did not want a union, and that the employees were all terminated. That same afternoon Hoy received a call from Shea while he was on vacation. Shea told Hoy that Cassis instructed her to fire the entire crew because they had gone to the Union.

*A. Hoy's Supervisory Status*

The judge found that Hoy was a statutory supervisor. The General Counsel has excepted, and we find merit in this exception. It is well settled that the burden of proving supervisory status is upon the party asserting it.[3] Thus, the burden was on the Respondent to establish Hoy's supervisory status. Contrary to the judge, we find that the Respondent has failed to meet that burden.

Hoy became employed by the Respondent through his mother, who was the property manager until her retirement in June 1994. She assigned him to be the superintendent in 1990. The porters mainly perform cleaning functions, and handymen or maintenance employees perform various types of repairs, although there is a degree of overlap in duties between these two classifications. When the type of repair requires the use of

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3. *Chevron U.S.A., Inc.*, 309 NLRB 59, 62 (1992), enfd. 28 F.3d 107 (9th Cir. 1994) (unpublished table decision); *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410 (9th Cir. 1985).

an outside contractor, George Cassis makes the decision to hire outside contractors.

When Hoy's mother retired, the Respondent hired Shea to be the property manager. Shea works in the office and supervises the secretary. She handles the collection of rents, screens applicants for apartments, acts as a liaison between the Respondent and its attorneys and tenants, receives and enters in the log book tenant requests for repairs, prepares the payroll, and, by her own admission, supervises unit employees.

Hoy lived in a rent-free apartment valued at $700 to $800 per month. His wages were $450 per week, the same as those of handyman Joe Moody, but less than those received by family member Dean Cassimitis. Hoy was scheduled to work from 8 a.m. to 4 p.m., Monday through Friday, but was on call 24 hours a day. Hoy reported to Shea and George Cassis. Hoy performed boiler maintenance and landscaping, as well as maintenance and repair work on buildings and apartments.

George Cassis came to the property once or twice a week and met with Shea and Hoy. They discussed matters such as equipment needs, new repairs, the need for outside contractors, and the expenditure of money. Hoy asked for direction on how to handle particular problems, and Cassis gave Hoy specific directions. When something special arose, Cassis called Hoy at home.

Shea informed Hoy of tenant complaints and repairs that needed to be made. Hoy and the other unit employees met with Shea daily in the office at 8 a.m. and discussed the work that needed to be done. Additionally, employees looked at the log book to determine the next project to be performed.

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Like Shea, Hoy interviewed job applicants and eliminated those he deemed to be unqualified. Significantly, George Cassis conducted his own interviews with the qualified candidates before making a hiring decision.

In his decision, the judge repeatedly expressed doubt concerning his conclusion that Hoy was a supervisor. For example, the judge stated that "[a]s Hoy's relationship to the company was one which evolved over time and was not reduced to any writing, the evidence regarding his supervisory status is, at least to my mind, ambiguous." The judge's decision is, at best, equivocal regarding his findings as to Hoy's authority to effectively discharge, hire, or reward employees.[4] The judge

4. We find that the Respondent has not sustained its burden of demonstrating that Hoy had the authority to discharge, hire, or reward unit employees, or effectively to recommend such action. Concerning Hoy's discharge recommendations, the judge found that "his recommendations had mixed results." Although Hoy successfully recommended the discharge of Shawn Bunch, the Respondent ignored Hoy's repeated recommendations that Moody be terminated for absenteeism. There is no evidence that Moody was even disciplined for his absenteeism. Hoy continually recommended that Carlos Reyes be terminated. The judge found that Cassis finally "acceded" to this request. We do not adopt this finding, however, because Reyes, Cassis, and Hoy all testified that Reyes was never discharged. When the record evidence is considered as a whole, we find that the Respondent has failed to show that Hoy's discharge recommendations were generally followed.

Concerning Hoy's role in the hiring process, his screening of applicants to eliminate individuals lacking the necessary qualifications is clearly not sufficient to establish 2(11) supervisory status. See *The Door*, 297 NLRB 601, 602 (1990). With the exception of one isolated instance in which Cassis agreed with Hoy's recommendation to "try out" Shawn Bunch, the son of a tenant, the record shows that Hoy's

(Cont'd)

acknowledged that Hoy "lacked many of the criteria for supervisory status." Nevertheless, the judge found that Hoy "assigned and directed the work" of unit employees, including nonroutine work, in a manner requiring the exercise of independent judgment, and he found Hoy to be a supervisor on that basis.

We agree with the General Counsel that Hoy possessed no primary indicia of supervisory status, including the authority to assign and direct the employees in a manner requiring the exercise of independent judgment.[5] The Board has observed

(Cont'd)
hiring recommendations were independently evaluated by George Cassis. Thus, as stated above, it was Cassis' practice to personally interview job applicants before deciding to hire them.

The Respondent contends, and the judge found, that Hoy successfully recommended that Moody be given a raise. We agree with the General Counsel that the evidence concerning this matter does not support a finding of supervisory status. The record reveals that Hoy merely asked Cassis to restore to Moody an $80 cut in take home pay lost because of an accounting change. The recommendation was not followed with respect to the amount. Even assuming this incident constituted an effective recommendation for a pay raise, it was the only such instance in Hoy's 6 years of employment. We find that it represents far too isolated an occurrence to constitute evidence of meaningful supervisory authority.

No specific evidence was presented that Hoy ever evaluated, transferred, promoted, laid off, recalled, disciplined, or suspended employees or adjusted their grievances.

5. The judge based his conclusion on two additional factors, namely that Hoy was "the highest paid of the maintenance employees," and that
(Cont'd)

*Appendix C*

(Cont'd)

Hoy was the only person "who could supervise the employees on a day-to-day basis." We agree with the General Counsel that the judge's latter two findings relate to secondary indicia of supervisory status. It is well settled that secondary indicia of supervisory authority are in themselves not controlling. *Consolidated Services*, 321 NLRB 845, 846 fn. 7 (1996). Furthermore, we find the judge's findings regarding these matters to be inaccurate. The judge incorrectly found that Hoy was the highest paid of all the maintenance employees. The value of his apartment translates to $175 to $200 per week. This amount plus Hoy's salary is still less than Cassimitis' salary. Presumably, the free apartment was a benefit Hoy received in return for being on call 24 hours a day.

The judge found that Hoy was the only person able to supervise the employees at the complex "on a day-to-day basis." In so finding, the judge discounted the daily presence of admitted Supervisor Shea and the regular visits of George Cassis and of George's mother and the Respondent's general partner, Carol Cassis. As noted, Shea was present daily on the property and admitted she "supervise[d] the men — staff" at the complex. Her admission is consistent with Hoy's description of Shea as his "boss" and is not diminished by her protestation that she lacked the technical experience in building maintenance. Furthermore, she testified that she accompanied Cassis on his inspections of the complex, during which they examined "things in need of repair." She further testified that during her daily conversations with Cassis, she discussed "things in need of repair or what was being done on it." Hoy testified that he discussed work to be done with Shea on a daily basis.

Concerning the visits of George Cassis, the record reveals that he was intimately involved in supervising the work at the facility. He conducted inspections of the property, noted the quality of employees' work, examined things in need of repair, discussed repairs with Shea, discussed with Hoy the manner in which repairs were carried out, authorized equipment purchases, hired contractors, and handled "whatever has to be taken care of" at the complex. With respect to Carol Cassis, the record shows that on one of her monthly visits to the property, she held a meeting with Hoy to discuss the security of his job and then conducted a job interview with applicant Charles Morrow.

(Cont'd)

that, in enacting Section 2(11), Congress stressed that only persons with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen, . . . and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Therefore, the Board has a duty to employees "not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied . . . rights which the Act is intended to protect." Id. at 1689. Additionally, the Board has often held that building superintendents were nonsupervisory employees.[6]

The judge conceded that the work performed by the porters was "repetitive or routine" and involved mainly cleaning. The judge found that "the same could not be said for the maintenance work which sometimes involved repairs and upkeep to the buildings, garage, and apartments." He further concluded that the maintenance work might require electrical work or light plumbing, and that such functions "can hardly be called routine." We find, however, that the Respondent has not presented sufficient evidence to support the judge's conclusion

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In sum, given the presence of Supervisor Shea at the apartment complex, the regular visits of General Manager George Cassis, and general partner, Carol Cassis, and the fact that Hoy was able to communicate with George Cassis by telephone, we conclude that the record does not support the judge's finding that Hoy was the only individual able to supervise the unit employees on a daily basis. See *First Western Building Services*, 309 NLRB 591, 603 (1992), and cases cited therein.

6. *Hagar Management Corp.*, 313 NLRB 438 (1993), *J.R.R. Realty* Co., 273 NLRB 1523 (1985), enfd. 785 F.2d 46 (2d Cir. 1986), and *Elias Mallouk Realty Corp.*, 265 NLRB 3225 (1982). We do not agree with the judge's finding that these cases are distinguishable.

that these duties are not routine. To the contrary, Shea acknowledged that the handymen performed the same kinds of routine minor repairs over and over again. The record reveals that nonroutine repairs requiring specialized expertise, such as bricklaying, plumbing involving pipe more than 2 inches in diameter, heating, and tree and glass work, were consistently performed by outside contractors.

The judge found that, during the morning meetings, Hoy "reviewed the work that needed to be done and gave out assignments." We find that the judge has mischaracterized the purpose of these meetings. According to Hoy's testimony, which was corroborated by Cioffi and Moody, the purpose of the meeting was for Hoy, who lived at the complex, to inform his co-workers if something had occurred during the night that they were required to deal with before they returned to their normal routine. The record is clear that the porters knew what to do regarding cleaning, that the handymen obtained their work assignments by referring to the tenant complaint book, and that no independent judgment was required to determine what problems constituted emergencies. We conclude that Hoy's announcements of emergency repairs cannot be considered evidence of supervisory authority.

Shea admitted that the handymen knew how to perform their repair work and did not require any further direction once they were notified of a tenant's complaint. There is no evidence that Hoy directed the employees in the performance of their work or evaluated their skills. Rather, Hoy testified that he only casually observed the work of other employees "in the process of performing [his] own duties."

We find that Hoy was an experienced senior employee subject to regular higher supervision. His limited role in the

parceling out of tasks to the other employees is attributable to Hoy's status as the most senior employee and the fact that he lived on the premises. Accordingly, we conclude that Hoy did not assign and direct the unit employees in a manner requiring the use of independent judgment, nor did he possess any other indicia of supervisory status within the meaning of Section 2(11).

We further find that Hoy was not an agent of the Respondent. There is no evidence that Hoy was so closely associated with management in such a manner that the employees might assume that he was speaking for management on union matters.[7] On the contrary, it was clear that he openly expressed to fellow employees his disagreement with management's benefit and other personnel policies. Neither did Hoy enjoy any special employment privileges because of the position that formerly had been held by his mother. Therefore, we do not adopt the judge's finding set forth at footnote 8 of his decision that Hoy was an agent of the Respondent.

B. *Hoy's Unlawful Discharge*

The judge found, and we agree, that the bargaining unit employees (other than Hoy) were discharged because of their union activity. In doing so, the judge properly rejected the Respondent's asserted reasons for each of the discharges. The judge credited Hoy's testimony that Shea informed Hoy that he was being discharged because he and the other employees went to the Union. We have found that Hoy was a unit

7. By contrast, in the case cited by the judge in fn. 8 of his decision, there was testimony supporting the conclusion that the employees tended to regard the superintendents as closely identified with management.

employee. Therefore, we conclude that Hoy was unlawfully discharged in violation of Section 8(a)(3), along with the other unit employees. Accordingly, we shall order that Hoy be offered reinstatement and given backpay and other remedies along with the other unit employees.

### C. *The Bargaining Order*

Because we have found that Hoy was not a supervisor, we reverse the judge's finding that the authorization cards solicited by him were tainted. We find that the cards are valid and demonstrate that at the time of the Union's demand for recognition a majority of the employees — four of the six members of the unit — wished to be represented by the Union.[8]

In determining whether a bargaining order is warranted to remedy the Respondent's unfair labor practices, we apply the test set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). There the Court identified two categories of cases in which a bargaining order would be appropriate absent an

8. The Respondent has questioned the validity of Moody's card because be did not sign it. The record shows that Moody filled out an authorization card, but neglected to sign it. Moody did, however, sign and date a form attached to the card, titled "Application for Membership." Moody also paid for and received a union "Membership Book" dated March 25, 1996. Further, when his failure to sign his authorization card was brought to his attention by Hoy, Moody approved the signing of the card by union delegate Davis. In these circumstances, we find that the authorization card in question clearly demonstrates Moody's desire to be represented by the Union.

In view of our determination that Hoy is not a supervisor, we find it unnecessary to pass on the General Counsel's contention that, even if he is a supervisor, the cards he solicited should be counted.

election. The first category of cases involves "exceptional cases" marked by unfair labor practices that are so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless have a tendency to undermine majority strength and impede election processes." In this second category of cases, the Court reasoned that the "possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed [by] cards would, on balance, be better protected by a bargaining order." Id. at 613, 614-615; *Massachusetts Coastal Seafoods*, 293 NLRB 496, 498 (1989).

In this case, the Respondent discharged the entire bargaining unit immediately after it learned that the Union requested recognition. Additionally, the Respondent made it clear to employees that the reason for the discharges was the unit employees' support for the Union.

Discharge of an entire bargaining unit is the ultimate retaliation for union activity, the final assault on the employment relationship. It is difficult to conceive of unfair labor practices with more severe consequences for employees or with more lasting effects on the exercise of Section 7 rights. Mass discharges leave no doubt as to the response that the employees will reasonably fear from their employer if, after reinstatement, they persist in their support for a union. Even newly hired employees Allien and Michel were not exempt from the Respondent's unlawful "power display" against the work force. See *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964). The coercive impact of the Respondent's

discharge of the entire unit is increased by virtue of the precipitate and reflexive nature of the discharges here, carried out immediately after the Union requested recognition.[9] Thus, the discharges served abrupt, graphic, and indelible notice on the employees that the Respondent controlled their employment, to the exclusion of any outside agency that might seek an improvement in their conditions. The impact of these discharges is further heightened by the special stature and direct involvement of George Cassis, who is an owner of the Respondent and the son of Carol Cassis, who holds the largest partnership share of the Respondent.

It can hardly be gainsaid that the Respondent's discharge of the entire bargaining unit, in conjunction with the Respondent's contemporaneous statement to employees that the reason for the mass discharge is their union activity, constitutes unfair labor practices that are both outrageous and pervasive. Therefore, we find that the Respondent's conduct places it in the realm of those exceptional cases warranting a bargaining order under category I of the *Gissel* standard, such that traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible.[10]

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9. *Astro Printing Services*, 300 NLRB 1028 (1990).

10. In a category I case like this one, the District of Columbia Circuit has held that the Board "need not make detailed findings of the type required for Category II cases, but instead must only make 'minimal findings' of the lasting effect of unfair labor practices to support a bargaining order." *Power Inc. v. NLRB*, 40 F.3d 409, 422 (1994). Consistent with the court's decision, we have set forth above our reasons for finding that the detrimental effects of the unfair labor practices will persist over time.

*Appendix C*

Additional support for the bargaining order is provided by *Balsam Village Management Co.*, 273 NLRB 420 (1984), enfd. 792 F.2d 29 (2d Cir. 1986). In that case, the Board found that a *Gissel* bargaining order was necessary to remedy what it described as the employer's "unlawful discharge of an entire bargaining unit, lock, stock and barrel, for the express purpose of avoiding the statutory bargaining obligation." The court of appeals upheld the Board's decision, finding that "[a]ll of the requirements for enforcement of a *Gissel* order have been met here." 792 F.2d at 33.

Furthermore, even assuming arguendo that the Respondent's conduct does not fall within *Gissel* category I, the unfair labor practices certainly qualify as "less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." *Gissel Packing*, supra at 614. Thus, the discharge of union adherents has long been considered by the courts to be a "hallmark" violation of the Act because of its lasting effect on election conditions. *NLRB v. Janwica Towing*, 632 F.2d 208, 212-213 (2d Cir. 1980). This unlawful conduct, which "goes to the very heart of the Act," *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941), directly affected every member of the bargaining unit. The Board has found that such hallmark violations committed by high company officials in a small unit have a tendency to undermine majority strength and impede the election process. *Airtex*, 308 NLRB 1135 (1992). While it is true that the discharged unit employees are entitled to reinstatement and backpay, these remedies would not, in our view, erase the coercive effect of the Respondent's conduct. The reinstated employees would not likely risk the recurrence of a long period of unemployment by engaging in further attempts to improve their working conditions, in the absence

of a bargaining order. And given the swiftness and thoroughness with which the Respondent reacted to the first sign of the Union's presence, the likelihood of it again resorting to illegal conduct is clearly present.[11]

In these circumstances, we conclude that the possibility of erasing the effects of the Respondent's unfair labor practices by traditional remedies and the conducting of a fair election is slight. We further find that the employee's representational desires as expressed by authorization cards would, on balance, be better protected by a bargaining order and that, therefore, a bargaining order is also warranted under category II of the *Gissel* standard.

Accordingly, we conclude that a bargaining order is presumptively appropriate in the circumstances of this case.[12] We shall not, however, order the Respondent to bargain with the Union at this time, because of the need to resolve the alleged picket line misconduct issue discussed below.

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11. The Respondent acted so precipitously that the Union never had sufficient time to utilize the Board's election machinery. (The discharges occurred just 1 day after the Union's election petition was filed.) In light of this track record, it is doubtful at best whether the Respondent would ever permit a fair election to be held.

12. In light of the Respondent's egregious and widespread misconduct demonstrating a general disregard for the employees' fundamental statutory rights, we find that a broad cease-and-desist order is warranted under *Hickmott Foods*, 242 NLRB 1357 (1979).

*Appendix C*

D. *The Alleged Picket Line Misconduct*

Concerning whether or not the Board should issue a bargaining order, the Respondent in its exceptions contends that certain picket line misconduct must preclude any such order under the doctrine set forth by the Board in *Laura Modes Co.*, 144 NLRB 1592 (1963). At the hearing, the Respondent presented testimony from two newly hired employees who crossed the picket line, at least one of whom was a union member, that a union official stated that he wanted to kill them. The Union presented several witnesses who denied that any such comments were made by anyone on the picket line and represented that the individuals who picketed remained off of the Respondent's property and conducted themselves at all times in a proper and orderly manner.

Because the judge's finding regarding the supervisor status of Hoy led him to conclude that there was no basis for a bargaining order, the judge did not set forth this conflicting testimony or make a credibility resolution concerning it. In light of our conclusion that a bargaining order is presumptively appropriate, we find it necessary to remand this proceeding to the judge for a resolution of this conflict in the testimony and for an analysis of the Respondent's *Laura Modes* defense.[13]

Accordingly, we shall remand this proceeding to the judge for the purpose of making resolutions of credibility concerning the testimony regarding the alleged picket line misconduct by

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13. We find no basis in the record for the Respondent's suggestion in its brief in support of its exceptions that the Union's picketing was conducted improperly in any other respect.

a representative of the Union, and findings of fact and conclusions of law concerning this evidence.[14]

ORDER

The National Labor Relations Board orders that the Respondent, Cassis Management Corporation. Dobbs Ferry, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Service Employees International Union, Local 32E, AFL-CIO (the Union), or any other union.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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14. Because this case involves a petition for relief pursuant to Sec. 10(j) of the Act, we ask the judge to issue his findings as expeditiously as possible.

(b) Make Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at is Dobbs Ferry, New York facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to

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15. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that this proceeding is remanded to Administrative Law Judge Raymond P. Green for the purpose of making credibility resolutions concerning the testimony regarding alleged picket line misconduct, findings of fact, conclusions of law, and recommendations concerning the alleged picket line misconduct and its effect on the appropriateness of a bargaining order.

IT IS ALSO FURTHER ORDERED that the judge prepare and serve on the parties a supplemental decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. April 14, 1997

*Appendix C*

William B. Gould IV, Chairman

Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Appendix C*

MEMBER HIGGINS, DISSENTING.

I agree with Administrative Law Judge Raymond P. Green's finding that Donald Hoy is a supervisor. Accordingly, I dissent from the contrary conclusion of my colleagues.

Hoy was the Respondent's superintendent. As such, he assigned and directed the work of unit employees. The judge found that, except for the cleaning work, the work performed by unit employees was not routine. More particularly, the repair and upkeep of the buildings, garage and apartments involved electrical and light plumbing functions. Both the selection of a particular employees for specific tasks, as well as the direction of these employees, required the use of independent judgment, according to the judge. I would not disturb these findings.[1]

Since Hoy was a supervisor, the cards that he solicited were not valid, and they, therefore, cannot be used to support a bargaining order.

Dated, Washington, D.C. April 14, 1997

John E. Higgins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

1. My colleagues assert that the tenant complaint book would set forth the work to be performed. However, this book did not set forth which particular employees would be assigned specific tasks.

*Appendix C*

## APPENDIX

## NOTICE TO EMPLOYEES
## POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting Service Employees International Union, Local 32E, AFL-CIO or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

*Appendix C*

WE WILL, within 14 days from the date of the Board's Order, offer Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of The Board's Order, remove from our files any reference to the unlawful discharges of Charles Allien, Louis Cioffi, Donald Hoy, Nicholas Michel, Joe Elias Moody Jr., and Charles W. Morrow and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

## APPENDIX D — DECISION AND ORDER BEFORE THE NATIONAL LABOR RELATIONS BOARD, DIVISION OF JUDGES, NEW YORK BRANCH OFFICE DATED SEPTEMBER 30, 1996

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL**
**LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**NEW YORK BRANCH OFFICE**

**CASE NO. 2-CA-29311**

**CASSIS MANAGEMENT CORPORATION**

**AND**

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32E, AFL-CIO**

*Ian Penny Esq.*, and *Lauri Kaplan Esq.*,
Counsels for the General Counsel.
*Robert Ziskin, Esq., and Stacey Ziskin, Esq.*,
Counsel for the Respondent.
*Mathew N. Persanis, Esq.*, Counsel for the Union.

### DECISION

#### Statement of Case

Raymond P. Green, Administrative Law Judge. This case was tried in New York, New York on July 22, 23, 24 and 31 and August 1, 1996. The charge and first amended charge were

filed on April 11 and April 16, 1996. On May 30, 1996, a Complaint was issued which, amended at the hearing, alleged in substance.

1. That from March 22 to March 25, 1996, a majority of employees in an appropriate unit, designated the Union as their representative.

2. That on or about March 27, 1996, the Union requested recognition in a unit consisting of

> All full-time and regular part-time cleaning, painting, and maintenance workers employed by the Employer at its facility located at 200 Beacon Hill Road, Dobbs Ferry, New York, excluding all managers and supervisors as defined in the Act.

3. That on or about April 4, 1996, the Respondent discharged all of its unit employees; to wit, Donald Hoy, Charles W. Morrow, Louis Cioffi, Joe Elias Moody Jr., Charles Allien and Nicholas Michel.

4. That the aforesaid conduct made a fair election improbable and therefore that a bargaining order should be issued.

## Findings of Fact

### I. Jurisdiction

The company, owns and manages various properties including the Mountainview Apartments in Dobbs Ferry, New

York. At the hearing, the company amended its Answer to admit and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practice[1]

### (a) The Status of Donald Hoy

The Respondent consists of the Cassis family. The two founders and general partners are Constantine and his wife Carol Cassis. Their children, George, Nicholas, Emanuel and Elaine Cassis, are limited partners. The children have a variety of functions but are subordinate to the parents in terms of the company's management. This enterprise owns various properties including an apartment complex called the Mountainview Apartments, which is located on a 15 acre tract of land in Dobbs Ferry, New York. The Respondent's main office and place of business is Freeport, New York, which is at least an hours drive from the Dobbs Ferry complex.

George Cassis is the family member who is responsible for, among other things, running the Mountainview Apartment complex which is a group of 262 garden apartments in 14 buildings. In this regard, in addition to visiting other properties, he visits this site about one or two times per week and consults

1. This company was found to have violated the Act in an earlier case called *Cassis Management Corp.*, 281 NLRB 1304 (1986). In that case, which involved an apartment building in Freeport, New York, the Respondent was held to have violated Section 8(a)(1) by unlawfully interrogating an employee, and to have violated Section 8(a)(3) of the Act by discharging an employee because he signed an authorization card for Local 32B-32J.

with either Donald Hoy, the superintendent or Kathy Shea, the office manager. (The Complaint alleged and the Respondent stipulated that Ms. Shea was supervisor within the meaning of Section 2(11) of the Act). George Cassis' son also works at this complex as a maintenance person. George Cassis' mother has no operational functions with respect to this apartment complex, although as we shall see further on, that she did make one decision that was important in this case.

I should note that this is a small company which does not have a highly defined hierarchy. As Hoy's relationship to the company was one which evolved over time and was not reduced to any writing, the evidence regarding his supervisory status is, at least to my mind, ambiguous.

Mr. Hoy became employed through his mother who was the property manager until her retirement in June 1994. After a period of time, she assigned him to be the superintendent and it appears that she pretty much defined his role at the apartment complex. In the past, there have been anywhere from between 3 to 6 other maintenance employees working at the complex at any given time. These consist of porters who mainly do cleaning functions and maintenance people who do various types of repairs except where the extent or type of repair may require the use of an outside contractor.[2] There is, however, a degree of overlap and then it snowed profusely during 1995, all of the employees were involved in snow removal.

When Mr. Hoy's mother retired, the Respondent hired Kathy Shea to be the property manager. She essentially works

2. When a repair may require the use of an outside contractor, this is a matter which is discussed between George Cassis and Donald Hoy. Mr. Cassis, obviously is the person who ultimately makes the decision as to whether to use a contractor.

in the office with a secretary and handles the collection of rents, screens people who apply for apartments, acts as a liaison between the company, its attorneys and tenants, receives and enters tenant requests for repairs, does payroll and supervises staff. As noted above, it was stipulated that Ms. Shea was a supervisor within the meaning of Section 2(11) of the Act. Contrary to General Counsel's assertion that Mr. Hoy reported to Shea, he testified that he considered himself to be on the same level as Ms. Shea. It is noted that Shea testified that she has no knowledge of repairs and maintenance and therefore she cannot and does not give instructions to the maintenance employees on these subjects.

The evidence shows that Mr. Hoy earned $450 per week and received the free use of an apartment that was worth between $700 and $800 per month. Thus, his total weekly remuneration was about $625 to $650 per week. This was more than any of the other porters and maintenance people working at the facility. In addition, he had the use of a company vehicle.

Every morning, Mr. Hoy held a meeting with the employees where he reviewed the work that needed to be done and gave out assignments. Hoy testified that his job was to see that the employees were doing their jobs correctly and that if they had problems they would talk to him about them. He also testified that employees would call him if they could not come in to work. While it may be said that the porter functions were repetitive or routine and mostly involved cleaning, the same cannot be said for maintenance work which sometimes involved repairs and upkeep to the buildings, garage and apartments. Thus, the maintenance people might on some occasions be called upon to do electrical work while at other times be

required to do light plumbing. These functions, which can hardly be called routine, were overseen by Mr. Hoy.[3]

By the Spring of 1996, there was quite of lot of repair and maintenance work that had to be done. And because of the extensive snow storms, which not only took time away from repairs but created damage to the structures, the backlog of repairs was quite extensive.

Mr. Hoy admittedly interviewed job applicants and he could eliminate from consideration, those people whose resumes or prior experience he felt were not adequate for a position. Along with Ms. Shea, he made hiring recommendations to George Cassis, but it is fairly clear that his recommendations have not always been followed.[4] Thus, in January 1996, Hoy recommended to Mr. Cassis that Mr. Morrow be hired, but someone else was hired instead. (Mr. Morrow was subsequently hired in April 1996 but Mr. Hoy did not play any role in that decision). On the other hand, Hoy and his mother interviewed and recommended the hiring of Joe Moody in 1990. (Mr. Hoy, on one occasion, also successfully recommended that Mr. Moody receive a pay increase). And Mr. Hoy recommended the hiring and subsequent discharge of Shawn Bunch in early 1996. (Bunch worked briefly as a porter).

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3. Louis Cioffi, one of the alleged discriminatees testified that he was employed as a landscaper and general worker whose job included painting, cleaning hallways, and keeping the grounds maintained. He testified that he would follow a routine unless Hoy assigned him to some other job that needed doing.

4. Mr. Hoy acknowledges that for some time before his discharge and his union activity, his relationship with George Cassis was strained. This could account for the fact that his recommendations were not always followed.

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The Respondent put in evidence to show that Mr. Hoy could commit the company's credit for purchases for supplies and tools. However, the evidence shows that other employees such as Joe Moody could do the same and therefore this assertion by the Respondent does not have much weight.

There also was evidence that Mr. Hoy, on various occasions, recommended to Mr. Cassis that individuals be discharged. In this respect, his recommendations had mixed results. For example, Hoy testified that he had unsuccessfully recommended that Moody be discharged on several occasions on account of his absenteeism. On the other hand, Hoy successfully recommended the discharge of Mr. Branch. Moreover, the evidence shows that Hoy kept asking for the discharge of Carlos Reyes, (a porter), until George Cassis acceded and discharged the man.

While not free from doubt, the evidence as a whole leads me to conclude that Mr. Hoy was a supervisor within the meaning of Section 2(11) of the Act.[5]

The Board and the Courts have interpreted Section 2(11) of the Act in the disjunctive so that the possession of *any one* of the authorities listed in this Section of the Act, places a person

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5. Section 2(11) of the Act defines as supervisor as follows:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

into the supervisory class. *Ohio Power Company v. NLRB* 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899. See also *NLRB v. Porta Systems Corp.*, 625 F.2d 399, 401, and 2nd Cir. 1980); *Allen Services Co.*, 314 NLRB 1060 (1994); and *Queen Mary*, 317 NLRB 1303 (1995). Nevertheless, the Board has made it plain that the party asserting that a person is a supervisor has the burden on that issue. *Adeo Electric*, 307 NLRB 1113, fn. 3 (1992).

While Mr. Hoy lacked many of the criteria for supervisory status, the evidence shows that he assigned and directed the work of between 3 and 6 individuals; that he oversaw their work and gave them direction; that at least some of this work, involving repair and maintenance, was not routine; and that in doing so, he exercised independent judgment. See *Superior Bakery*, 294 NLRB 256 (1989); *Rose Metal Products*, 289 NLRB 1153 (1988); *Illini Steel Fabricators, Inc.*, 197 NLRB 303; and *Custom Bronze & Aluminum Corp.*, 197 NLRB 397 (1972).

The evidence shows that Mr. Hoy was the highest paid of the maintenance employees. Moreover, as Ms. Shea did not have the knowledge to supervise repair and maintenance work, and as George Cassis visited about 2 times a week, the only person at the facility who could supervise the employees on a day-to-day basis was Mr. Hoy.

The General Counsel cites a number of cases where building superintendents were held to be non-supervisory employees.

In *J.R.R. Realty Co.*, 273 NLRB 1523, (1985), the Administrative Law Judge, (ALJ), concluded that the person

in dispute was not a supervisor, but was more in the nature of "an experienced, senior employee who routinely oversees the maintenance of the building, and is subject to regular and constant higher supervisor." The ALJ noted that higher management visited the job site at least once a week to inspect what was going on. He noted that there were only two other employees, (the elevator operator and porter) who had jobs that were repetitive in nature and which required no particular further instructions or assignments. The Board noted that although the individual in question testified that he "hired" the porter, and that the authority to hire is often a dispositive factor for supervisory status, that if the "hiring" individual merely performed a ministerial act or hired at the direction of another, this would not, by itself, prove supervisory status.

In *Hagar Management Corp.*, 313 NLRB 428 (1993), the Respondent was charged, *inter alia,* with being a successor and not recognizing the Union that had been party to a contract with the predecessor company. That contract covered two people employed at the building; the superintendent and the porter. The ALJ concluded that the superintendent was not a supervisor, (and therefore illegally discharged), noting his testimony that he had none of the authority listed in Section 2(11) of the Act, that he merely passed along complaints about dirt to the porter, and that if tenants requested repairs, he would have to obtain permission to make the repair from the management office. The ALJ also found that since the purchase of the building, the new company sent a supervisor to the building several times a week.

In *Elias Malluk Realty Corp.*, 265 NLRB 1225, (1982), the Employer was found to have illegally withdrawn recognition from one union, while entering into a contact with a rival union.

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The ALJ found that the superintendents, (who had been represented under the old contract with Local 32B-32J), did not exercise supervisory authority. In this regard, he held that their hire and discharge recommendations were independently evaluated by higher management who did not uniformly or even generally follow their recommendations. The ALJ concluded that the superintendents were more like experienced, senior employees who "routinely supervise the maintenance of their buildings, but subject to regular and constant higher supervision, report and even recommend on personnel actions regarding the assistants under them, but do not exercise independent judgment on personnel matters and are not uniformly or even generally followed on their personnel recommendations when made or solicited."

Notwithstanding the conclusion that the superintendents in *Elias Malluk Realty Corp.*, were not supervisors, the ALJ nevertheless found that they were agents of the Respondent for purposes of itsliability pursuant to Section 8(a)(1) and (2) of the Act, (For the threat by one and the assistance conduct of the other). He noted that the employees tended to regard the superintendents as closely identified with management and that the employees could reasonably believe that the superintendents spoke and acted for management, particularly on union-related matters.

Notwithstanding the cases cited above, (and the other cases cited by the General Counsel in his Brief), I think that the facts of the present case are distinguishable and put Hoy over the line into supervisory status.

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**(b) The Status of Charles Morrow.**

The Respondent asserts that Mr. Morrow was retained as an independent contractor. I reject this contention and find that he was hired as an employee.

Prior to his association with the Respondent, Mr. Morrow was a self-employed contractor. (He and Mr. Hoy knew each other through the school that their children attended). In response to a newspaper advertisement, he spoke to Kathy Shea in January 1996 and was also interviewed by George Cassis. At that time, he was engaged to do a single tiling job lasting about 3 hours for which he was paid $75.00. Upon finishing that one job, he was not called back by the Respondent until March 1996.

In mid-March, 1996, Morrow spoke with Hoy and was told that the company needed someone. According to Morrow, he had an interview with George Cassis, Emanuel Cassis and Carol Cassis on March 20, 1996. Morrow states that he explained what he could do and what his fees were but stated that he wanted to be hired as an employee rather than as a contractor. And in this regard, Morrow states that there was a discussion about whether to hire him as an employee or an independent contractor and that he was told that they wanted to think it over. Finally, Morrow testified that he was asked if he would sign a contract stating that he would not join a union. Nothing was settled during this meeting and the employers representatives said that they would contact Morrow.

According to Mr. Morrow, he received a phone call from George Cassis on the evening of March 20 and was told that the family had talked it over and that he, (Morrow), was hired to begin on April 1 at $500 net pay per week.

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Morrow testified that on March 27, 1996 he filled out an application form given to him by Ms. Shea and that he was told to report to work immediately. He states that he also filled out a tax withholding form, and that Shea, after looking at a chart, figured out that he would have to have gross weekly earnings of between $696 and $704 to reach a net weekly pay of $500.00. At the same time, Morrow states that he spoke to Shea and George Cassis who set up his work schedule as being from Monday through Friday from 8 a.m. to 4 p.m. with the commitment that he would also be available for emergencies. He testified that no-one said that this was going to be a temporary job or that he was being retained as an independent contractor. He also was told that Mr. Hoy was about to go on vacation.

On March 28 Mr. Morrow was shown around the property by Mr. Hoy who told him what his daily duties would be. Hoy also took him over to Readers Hardware to introduce him there so that he could make purchases on behalf of the Respondent. In addition, Kathy Shea gave him a copy of a list of backlogged repairs that needed to be taken care of. Morrow began working on this day and Mr. Hoy went on vacation on the following day.

George Cassis testified that when he offered the position to Mr. Morrow, he explicitly made the offer based on the understanding that Morrow would be working as an independent contractor. Nevertheless, whatever words were used at the time of the offer, (and I will credit Morrow's version), the determination of whether a person is an employee or independent contractor is not dependent on the title used but on the actual relationship between the individual and the company. *National Freight, Inc.*, 153 NLRB 1536 (1965).

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The test of whether an individual is an independent contractor or an employee is the common law of agency right-to-control test. *NLRB v United Insurance Co.,* 390 U.S 254, 256, (1968). Pursuant to that test, an employer-employee relationship exists when the employer reserves the right to control not only the ends to be achieved, but also the means to be used to achieve those ends. On the other hand, where the control is reserved only as to the result, an independent contractor relationship exists. *Gold Medal Baking Co. Inc.,* 199 NLRB 895, (1972). See also *Standard Oil Co.,* 230 NLRB, 967, 968 (1987).

In the present case, the evidence indicates that Mr. Morrow was hired to work for an indefinite duration, on a regularly scheduled 8 hour day, and to perform work assigned to him daily by the Respondent on its premises. He was to use the tools and equipment of the Respondent and was, during his scheduled hours, to work exclusively for the Respondent. That the Respondent may have chosen to call him an independent contractor is of no legal consequence, since it is clear to me that the Respondent intended to retain the right to control not only the ends to be achieved but also the means to be used to achieve those ends.

**(c) The discharges**

In the second or third week of March 1996, Mr. Hoy met with representatives of the Union and talked to them about the possibility of having union representation. On or about March 22, 1996, he went to the Union's office where he obtained union authorization cards which he thereafter distributed to employees.

Mr. Hoy signed a union card on March 22, 1996 and he was the person who solicited the others to sign the cards. Mr. Cioffi, and Mr. Morrow signed union cards on March 25. Mr.

Moody, although not signing a card himself, testified that he authorized a Union representative to sign a card on his behalf, after Hoy told him that he had forgotten, to sign the card that Hoy had given him.

Contemporaneous with the above, Mr. Hoy and Mr. Cassis got into a big argument over a matter unrelated to the Union. Mr. Cassis placed this argument as taking place on or about March 21 whereas Mr. Hoy placed it on or about March 27. In either event, the argument took place before the company was aware of the Union and both sides agree that it was very heated.[6] According to Mr. Hoy, George Cassis accused him of ruining his relationship with his family. At one point during the argument, Cassis told Hoy to "get the fuck out," and states that he intended, by those words, to discharge Hoy. He acknowledges, however, that he did not use the words, discharge or fire.

According to Mr. Hoy, after the argument, Ms. Shea told him, later in the day, that she had talked to George's mother, (Carol Cassis), who told her that Hoy was not fired and that although George was her son, she was still the boss.[7] He also testified that a day or two later, he met with Carol Cassis who confirmed that his job was still secure. In this regard, Mrs. Cassis testified that she went to the property on March 26, 1996 and that she had a conversation with Mr. Hoy on that date. Both Mrs. Cassis and her other son, Emanuel, testified that during the conversation, she asked if Hoy was coming back to

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6. This argument did not come out of the blue as Hoy admitted that before this time, his relationship with George Cassis was "awkward at best."

7. George Cassis testified that his mother had authority over him in relation to the running of the business.

work after his vacation and that when he said yes, she told him that his job would still be there. It therefore is clear that despite the blowup between George Cassis and Donald Hoy, the latter was still employed by the Respondent when he left for his vacation on April 1, 1996.

Union attorney, Mathew Parsanis, wrote a letter to the company which was dated March 26, 1996 and signed by the Union's president, Robert L. Chartier. The letter was addressed to Cassis Management, at 100 Brooklyn Avenue, Freeport, Long Island, and, on Wednesday, March 27, 1996, was put in the place where outgoing mail was picked up by the mailman. The letter stated:

> Please be advised that Local 32E of the Service Employees International Union has been designated by the employees of the above captioned building to act as their collective bargaining agent, pursuant to the New York State Labor Relations Law.
>
> In view of this designation, we are arranging an appointment for Wednesday April 10, 1996 at 2:30 p.m. in our Bronx office and see Mr. Matthew Persanis, Esq. to discuss the agreement covering wages, hours, working conditions and benefits for such employees.
>
> In the event that this appointment cannot be kept, please do not hesitate to contact this office to arrange a convenient day and time.

Not receiving any response to this letter, the Union filed a petition for an election in Case No. 2-RC-21674. This was received in the Regional Office on April 3, 1996 at 2:36 p.m.

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Between March 22 and April 4, two new employees were hired as porters. These were Charles Allien and Nicholas Michel.

Assuming, as I do, that the mailman picked up the Union's letter on March 27, it would be extremely unlikely that the letter would not have been received before April 4, 1996 when the discharges occurred. Although George Cassis at first testified that he was unsure if he got this letter before or after April 4, and later testified that he received it on April 5, I don't believe him and I conclude that he received the letter on or before April 4. (I view as suspicious the fact that the Respondent, although retaining the original of the letter, claims that it did not retain the envelope which would have shown the date stamp. I also view as suspicious the fact that the original had several things written on it and then crossed out in such a manner that they could not be read).

On the afternoon of April 4, Ms. Shea informed all the employees, (except for Cioffi who had gone home early and George's son), that they were discharged. And in this regard, Charles Morrow credibly testified that after Shea said that they were all discharged, he got on the phone with George Cassis, who said that he had gotten a letter from the Union, that he didn't want a union, and that they were all terminated.

On April 4, 1996, while Mr. Hoy was on vacation in Florida, he received a phone call from Ms. Shea. He credibly testified that during the conversation, she told him that George Cassis had called her from the Long Island Office and told her that the men went to a Union and to fire everyone. (Although denying that George Cassis said anything about a union, Ms. Shea does concede that on April 4 she was told by him to fire the entire crew).

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Louis Cioffi testified that he left early on April 4 because he didn't feel well and didn't go to work on April 5 or 6. He testified that when he called Donald Hoy on Sunday, April 7, he was told that they were all fired. Cioffi took Hoy's word for it and did not report back to work. Instead, when the Union put up a picket line, he participated in the picketing on one day. Since it is clear from Shea's testimony that she was directed to discharge all of the workers, I conclude that Cioffi would have been discharged on August 4 had he been present on that day and that the message that he received from Hoy on April 7, simply confirmed that state of affairs. I also note that the Respondent did not communicate with Cioffi after April 7 in an effort to have him return to work.

The Respondent argues that Morrow was never terminated and that it is ready to use him as an independent contractor when needed. It has, however, never offered him any more work after April 4. Based on the credited testimony of Morrow, I conclude that he was hired as an employee and that he was discharged with the other employees on April 4.

The Respondent contends that it discharged Mr. Moody because of his past poor attendance. Although Mr. Moody may have had a poor attendance record, the evidence shows that for a long period of time the Respondent tolerated his absences, apparently because George Cassis felt that Mr. Moody offered good performance while at the job. I also note that in during the 3 week period before April 4, Mr. Moody had no attendance problems.

Based on the credited evidence, the only conclusion that I can reach in this case is that having received the Union's demand for recognition, the Respondent, as it did in a prior

case, responded by discharging the people employed at the Mountain-view job site. (Retaining only Mr. Cassis' son). This conclusion is based on the timing of the discharges in relation to the receipt of the recognition demand and on the credited testimony of Mr. Hoy and Mr. Morrow. Although Mr. Alien and Mr. Michel did not sign cards for the Union, (having been only recently hired), this fact is not significant because the evidence shows that George Cassis' object was to remove the entire crew because there was, in his mind, reason to believe that the employees there might choose to be represented by a union.

Notwithstanding this conclusion, I must nevertheless recommend that insofar as the Complaint alleges the unlawful discharge of Mr. Hoy, this allegation should be dismissed because of his supervisory status. *Parker-Robb Chevrolet, Inc.* 262 NLRB 402 (1982).

**(d) The 8(a)(5) allegation**

The evidence here shows that Mr. Hoy was a supervisor and that he was the person who solicited and obtained the authorization cards from Cioffi and Moody. As such, these cards and his own, cannot form the basis for showing that the Union represented a majority of the employees. *Carl H. Neuman d/b/a Sara Neuman Nursing Home,* 270 NLRB 663 (1984). Accordingly, as the General Counsel cannot show that a majority of the employees voluntarily selected the Union as their representative, the refusal to bargain allegation must be dismissed.[8] In this regard, I view as distinguishable the cases

8. Even if I had concluded that Mr. Hoy was not a supervisor, I would nevertheless find that the cards were tainted based on his relationship between management and the employees. See for example *Elias Malluk Realty Corp.*, 265 NLRB 1225, (1982). At the time of the

(Cont'd)

cited by the General Counsel in his Brief. For example, in *A.P.R.A. Fuel Oil,* 309 NLRB 480, 498-99 (1992) the Board held that the fact that a low level supervisor participated in the union campaign, did not taint cards solicited by others. And in *United Artists Communications,* 280 NLRB 1056 (1058), the Board stated:

> As the judge notes, supervisory participation in the solicitation of authorization cards, normally "taints" the cards, rendering them unreliable as indicators of employee support for a union. However, we agree with the judge that the normal rule does not apply to the unusual circumstances in this case. At the time, Tola solicited the cards, he was scheduled for discharge, told the employees he was being discharged, and asked the employees not to tell management that he was soliciting cards. . . . He did not make any promises of benefits or threats of reprisals in regard to their employment in the course of his solicitation of the authorization cards. Indeed, three of the employees who signed authorization cards for Local 5A had been strongly advised as recently as 4 months earlier by then-Theater Manager Mancuso *against* signing union cards. . .
>
> Thus, at the time the employees were solicited by Tola to sign authorization cards for Local 5A in

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(Cont'd)
demand for recognition, there were 5 employees plus Hoy. Of these, Cioffi signed a card directly solicited by Hoy. Moody did not actually sign a card, but asserts that he authorized a union agent to sign a card on his behalf. Morrow signed a card at the Union's office in the presence of Mr. Hoy. Alien and Michel did not sign union cards.

June 1982, they were well aware of the Respondent's strong opposition to unions, and had been threatened with discharge if they joined a union. They were also aware that Tola himself would soon be discharged and would therefore be incapable of either rewarding them for signing a card, or punishing them for not doing so. Under these circumstances, we agree with the judge that the potentially objectionable effects of card solicitation by a supervisor are not present in this case.

**Conclusions of Law**

1. By discharging Charles W. Morrow, Louis Cioffi, Joe Elias Moody Jr. Charles Allien and Nicholas Michel, the Respondent violated Section 8(a)(1) & (3) of the Act. .

2. By the conduct noted above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent has not violated the Act in any other manner alleged in the Complaint.

**Remedy**

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

*Appendix D*

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [9]

**ORDER**

The Respondent, Cassis Management Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Service Employees International Union, Local 32E, AFL-CIO, or any other union,

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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9. If no exceptions are filed as Provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Charles W. Morrow, Louis Cioffi, Joe Elias Moody Jr., Charles Allien and Nicholas Michel, within 14 days, of this order, immediate and full reinstatement to their former jobs or, of those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Dobbs Ferry, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms

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10. If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 11 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(f) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 30, 1996

s/ Raymond P. Green
Raymond P. Green
Administrative Law Judge

*Appendix D*

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Service Employees International Union, Local 32E, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Charles W. Morrow, Louis Cioffi, Joe Elias Moody Jr. Charles Allien and Nicholas Michel immediate and full

reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the aforesaid employees and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

Cassis Management Corporation

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 26 Federal Plaza, Room 3614, New York, New York 10278-0104, Telephone 212-264-0346

## APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 21, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CAROLYN CLARK CAMPBELL,
CLERK

As a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of July, one thousand nine hundred and ninety-eight.

Docket No. 97-4125 (L) & 97-4355 (XAP)

Cassis Management Corporation,

Petitioner-Cross-Respondent,

v.

National Labor Relations Board,

Respondent-Cross-Petitioner.

A petition for rehearing containing a suggestion that the action be *reheard in banc* having been filed herein by the Petitioner-Cross-Respondent *Cassis Management Corporation,*

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

*Appendix E*

It is further noted that the suggestion for rehearing in banc has transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court
CAROLYN CLARK CAMPBELL, Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney